Duquesne Law Review

Volume 12 | Number 3 Article 13

1974

Constitutional Law - Landlord-Tenant Law - Due Process - Tenant's Due Process Right to Notice and an Opportunity to Be Heard Prior to Distraint of Tenant's Property

David S. Pollock

Case Comment

CONSTITUTIONAL LAW—LANDLORD-TENANT LAW—DUE PROCESS—TENANT'S DUE PROCESS RIGHT TO NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO DISTRAINT OF TENANT'S PROPERTY—The United States District Court for the Eastern District of Pennsylvania has held Pennsylvania's statutory distraint procedure facially unconstitutional in violation of the due process clause of the fourteenth amendment, since the procedure permitted a landlord, acting upon his unilateral claim that rent is owing, to levy on property found on a tenant's premises while only requiring the landlord to give his tenant notice within five days following the distraint.

Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972).

Consistent with the trend established by the United States Supreme Court[1] that summary prejudgment procedures which deprive one of his property without prior notice and an opportunity to be heard are unconstitutional, a three-judge district court in the eastern district of Pennsylvania[2] has recently declared Pennsylvania's distraint procedure[3] facially unconstitutional on the basis of the fourteenth amendment's prohibition of the deprivation of property without the due process of the law.[4] Beyond mere consistency with pronouncements of the Supreme Court of the United States concerning procedural due process requirements,[5] the *Gross* decision represents a logical extension of a prior Pennsylvania eastern district court decision,[6] and an unfortunate consequence of *Fuentes v. Shevin*.[7]

---

1. Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), represent far from a complete listing of the prejudgment seizure cases which made their way to the United States Supreme Court.
2. Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972) (jurisdiction was found pursuant to 28 U.S.C. §§ 1343(3), 2201, 2281 (1970)).
3. PA. STAT. ANN. tit. 68, §§ 250.302-.404 (1965) [the Pennsylvania Landlord Tenant Act of 1951 will hereinafter be referred to as the Act of 1951].
4. 349 F. Supp. at 1165.
5. *See* Fuentes v. Shevin, 407 U.S. 67, 81 (1972).
6. Santiago V. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970). The *Gross* decision was filed on October 24, 1972, and the *Santiago* opinion on October 26, 1970.
7. 407 U.S. 67 (1972). The *Fuentes* decision ruled the Pennsylvania replevin with bond procedure unconstitutional and thus precluded the tenant from utilizing his own practical and effective remedy in cases of distraint.

Upon returning to her apartment, Susan Gross was met with a notice of distraint posted on the outside of the door to her residence. On the inside, she was greeted by the absence of certain of her belongings which had been removed by the defendant Fox, a deputy constable, who had entered the plaintiff's apartment without her knowledge.[8] The deputy, as an agent of the plaintiff's landlord, levied the distress and posted the required details[9] of such an action under the authority of section 302 of the Pennsylvania Landlord and Tenant Act of 1951.[10] Pursuant to 42 U.S.C. § 1983 (1970),[11] and its jurisdictional correlate 28 U.S.C. § 1343(3) (1970),[12] Gross instituted a class action seeking a declaratory judgment of the unconstitutionality of PA. STAT. ANN. tit. 68, §§ 250.302-.404 (1965), and a permanent injunction restraining the defendants from utilizing the Pennsylvania distraint procedure.[13]

---

8. 349 F. Supp. at 1165.

9. PA. STAT. ANN. tit. 68, § 250.302 (1965), provided:

Personal property located upon premises occupied by a tenant shall, unless exempted by article four of this act, be subject to distress for any rent reserved and due. Such distress may be made by the landlord or by his agent duly authorized thereto in writing. Such distress may be made on any day, except Sunday, between the hours of seven ante meridian and seven post meridian and not at any other time, except where the tenant through his act prevents the execution of the warrant during such hours.

Notice in writing of such distress, stating the cause of such taking, specifying the date of levy and the personal property distrained sufficiently to inform the tenant or owner what personal property is distrained and the amount of rent in arrears, shall be given, within five days after making the distress, to the tenant and any other owner known to the landlord, personally, or by mailing the same to the tenant or any other owner at the premises, or by posting the same conspicuously on the premises charged with the rent.

A landlord or such agent may also, in the manner above provided, distrain personal property located on the premises but only that belonging to the tenant, for arrears of rent due on any lease which has ended and terminated, if such distress is made during the continuance of the landlord's title or interest in the property.

10. *Id.*

11. 42 U.S.C. § 1983 (1970), provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In Santiago v. McElroy, 319 F. Supp. 284, 292 (E.D. Pa. 1970), the court found "sufficient state involvement" in these distress proceedings since state officials perform distress sales and since the sales are authorized by state statute.

12. 28 U.S.C. § 1343(3) (1970), provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usuage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

In Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), the Supreme Court dissolved the distinction between personal liberties and proprietary rights for the purpose of achieving a federal forum through section 1343(3). *See* 11 DUQ. L. REV. 686 (1973).

13. 349 F. Supp. at 1164.

The district court first held the distraint statute unconstitutional as applied, in violation of the fourth amendment's prohibition against unreasonable searches and seizures,[14] but denied the declaratory judgment sought by the plaintiff. Subsequently, the defendants moved to vacate the opinion which so held by arguing that the plaintiff's complaint addressed itself only to the question of facial unconstitutionality. The plaintiff also requested reconsideration of her claim that the distraint provisions were facially unconstitutional because they violated the fundamental requirements of due process by permitting a taking of property before notice was given and an opportunity to be heard afforded. In its second decision the district court vacated its first opinion.[15]

I. Origin of Distraint

Section 302 and accompanying sections of the Act of 1951 were a codification of the common law and Pennsylvania's original distraint statute.[16] The distraint procedure is one of ancient origin. In feudal days, the king or lord of the manor possessed three remedies by which he could enforce services due him: (1) an action in the king's court for the recovery of customs and services; such an action was proprietary, not possessory, and would be instituted in the case of a dispute over the nature or the quantity of the tenant's services;[17] (2) distress;[18] and (3) proceedings in the lord's own court to exact rent or expel a defaulting tenant; after distraining chattels, the lord would obtain a judgment to authorize his distraint of the land, a seizure for the purpose of securing the performance of the tenant's duty[19]—an action designed to coerce the tenant to pay his dues.

Pollock and Maitland described the distraint procedure as "the landlord's handiest remedy."[20] Scrupulously following certain rules con-

14. On June 30, 1972, the court sustained a fourth amendment challenge to the distraint procedure and held that the entry necessary to effectuate the distraint, without the tenant's knowledge and consent and without notice and a prior hearing, was an unconstitutional search and seizure. *See* Note, *Landlord and Tenant—Pennsylvania's Distress and Distraint Law*, 18 Vill. L. Rev. 771, 775-76 (1973).

15. 349 F. Supp. at 1165.

16. Act of March 21, 1772, ch. 645, §§ 1, 14, [1772] Pa. Laws 370 (repealed 1951) [hereinafter referred to as the Act of 1772].

17. 1 F. Pollock & F. Maitland, The History of English Law 352 (2d ed. 1952) [hereinafter cited as Pollock & Maitland].

18. *Id.* at 353.

19. *Id.* at 354.

20. *Id.* at 353.

cerning when, where and what may be seized, the lord would take the tenant's or a stranger's chattels found upon the tenement in order to ensure the tenant's performance of services which were in arrears.[21] The lord would hold the chattels until either the tenant paid his arrearages or he posted security to contest the seizure in court.[22]

According to Holdsworth, distraint is "the oldest form of self-help,"[23] and has been retained through the years as a remedy through legal process.[24] Severe regulations were placed upon the landlord's right to distrain chattels and neglect of such rules made the lord a trespasser.[25] In addition to the tenant's original remedy of replevin, he could seek damages for any wrongful interference with or detention of his goods.[26] Since replevin assured the tenant who brought such an action that he could remain in possession of chattels levied upon and they could not be sold pursuant to the Sale of Distress Act of 1689, it occupied a unique position in the sphere of landlord-tenant law.[27]

Though distraint appeared to be an exception to English law's prohibition of self-help remedies,[28] by the thirteenth century, one's property could not be distrained without leave of court.[29] Thus, through its very usefulness, the distraint procedure had become entrenched in the legal process.

As stated above, the procedure was utilized in order to persuade the

21. *Id.* "He who was entitled to the services had the right to seize and hold the goods of the obligor until performance." *See* Rhynhart, *Distress*, 13 MD. L. REV. 185 (1953).

22. "The idea of distress (districtio) is that of bringing compulsion to bear upon a person who is thereby to be forced into doing something or leaving something undone; it is not a means whereby the distrainor can satisfy the debt that is due to him." POLLOCK & MAITLAND, *supra* note 17, at 353.

23. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 245 (3d ed. 1923) [hereinafter cited as HOLDSWORTH]. "The essence of distraint is, as Blackstone puts it, 'the taking of a personal chattel out of the possession of a wrongdoer into the custody of the party injured to procure a satisfaction for the wrong committed.'"

24. *Id.* at 245-46.

25. *Id.* at 247; *see* Comment, *The Pennsylvania Landlord and Tenant Act of 1951*, 13 U. PITT. L. REV. 396, 399, 403 (1952); Pollock and Maitland wrote: "The offense that he commits in retaining the beast after gage and pledge have been tendered . . . stands next to robbery; it is so royal a plea that very few of the lords of the franchises have power to entertain it." 2 POLLOCK & MAITLAND, *supra* note 17, at 577.

26. By the late sixteenth century, the significance of trover diminished. *See* 3 HOLDSWORTH, *supra* note 23, at 285-86. Due to the severity of the offense caused by a landlord's abuse of his power to distrain and as a result of the decreasing terrors of such a trespass action, for it could easily be removed from the county court to the king's court, by either party, Pollock and Maitland observed that it was a matter of convenience which heralded the development of replevin as the tenant's most important remedy, 2 POLLOCK & MAITLAND, *supra* note 17, at 577-78. *See* Fuentes v. Shevin, 407 U.S. 67, 78-79 (1972).

27. Santiago v. McElroy, 319 F. Supp. 284, 286 (E.D. Pa. 1970).

28. 2 POLLOCK & MAITLAND, *supra* note 17, at 575. "This thought, that self-help is an enemy of law, a contempt of the king and his court, is one of those thoughts which lie at the root of that stringent protection of seisen." *Id.* at 574.

29. *Id.* at 575.

tenant to pay his arrearages or to post security and contest the landlord's claim.[30] Of importance is the fact that when the distrainor took the chattels, he did not take "possession," but rather he held them in his "custody."[31] If the tenant was not persuaded to perform services due, the distrainor merely held the chattels to no avail whatsoever.[32] However, in 1689, the complexion of the remedy underwent a demonstrable change. The Sale of Distress Act of 1689[33] empowered the landlord to sell the distrained chattels to satisfy rent due him,[34] upon following specific rules.[35] In all jurisdictions of the United States in which the distraint remedy existed the right to sell the goods seized was incident to the remedy.[36] The power of distraint and this incidental right to sell the goods was not unanimously recognized in the United States.[37]

II. Distraint in Pennsylvania

In Pennsylvania, the landlord's remedy of distraint was governed by the English common law,[38] and it was not until 1772 that the law was placed in statutory form.[39] The Act of 1772 went beyond mere codification of the existing law in Pennsylvania, and provided the landlord with power to sell the distrained goods under essentially the same circumstances as the English Act of 1689 which had not governed in Pennsylvania.[40]

Over the years, the remedy has continued to be well-recognized for its usefulness.[41] Whether it is deemed a power[42] or a right,[43] distraint

30. Santiago v. McElroy, 319 F. Supp. 284, 286 n.3 (E.D. Pa. 1970). Distress was also used to enforce obedience to an order of court and to keep and impound a beast to recover damages done by it to the distrainor's property. *See* 3 Holdsworth, *supra* note 23, at 246.

31. "He must be always ready to show them; he must be ready to give them up if ever the tenant tenders the arrears or offers gages and pledge that he will contest the claim in a court of law." 2 Pollock & Maitland, *supra* note 17, at 576.

32. Santiago v. McElroy, 319 F. Supp. 284, 286 n.3 (E.D. Pa. 1970).

33. Sale of Distress Act of 1689, 2 W. & M., c. 5, § 2 [hereinafter referred to as the Act of 1689].

34. 2 H. Tiffany, Landlord and Tenant 1986, § 325 (2d ed. 1970) [hereinafter cited as Tiffany].

35. Santiago v. McElroy, 319 F. Supp. 284, 286 n.4 (E.D. Pa. 1970).

36. 2 Tiffany, *supra* note 34, § 325, at 1986.

37. *Id.* at 1987. The law of distress was even the subject of scathing literary criticism. 15 Holdsworth, *supra* note 23, at 377.

38. 319 F. Supp. at 287.

39. Act of March 21, 1772, ch. 645, §§ 1, 14, [1772] Pa. Laws 370 (repealed 1951).

40. Santiago v. McElroy, 319 F. Supp. 284, 287 & n.6 (E.D. Pa. 1970).

41. *In re* Edmunds, 30 F. Supp. 934, 935 (M.D. Pa. 1940) ("Distress for rent in arrear is one of the most ancient, as well as one of the most efficient, of the landlord's remedies for the collection of rent. It is now, as it was at common law, a right belonging to the landlord whenever the relation of landlord and tenant exists.")

is in the *nature* of a lien, but not actually a lien until the goods have been distrained under the landlord's warrant.[44] The remedy arose the moment the relationship of landlord and tenant came into being[45] and was in reality a "matter of agreement"[46] between the parties on the oral or written lease.

The Act of 1951 brought much needed codification, simplification and revision to the Act of 1772,[47] but made no fundamental changes in the substantive nature of the power of distress, the right to sell incident thereto and the right of the tenants to protect themselves under those circumstances.[48] The new act[49] provided that personal property[50] located on the premises occupied by a tenant was subject to distress made by a landlord or his agent for any rent "reserved and due."[51] Rent was "reserved and due" if the rent payment was but one day late,[52] though the landlord had previously accepted tardy rent payments.[53] Unless

42. Santiago v. McElroy, 319 F. Supp. 284, 286 (E.D. Pa. 1970).

43. Farbro Trading Corp. v. Jo-Mar Dress Corp., 78 Pa. D. & C. 337, 341 (C.P. Lack. Co. 1951).

44. Shalet v. Klauder, 34 F.2d 594, 595 (3d Cir. 1929). When the landlord exercised his power, distress resembled a lien since his right to property under his control had priority over existing liens. *See In re* West Side Paper Co., 162 F. 110, 111-12 (3d Cir. 1908), which stated:

> The right to distrain or levy upon all the goods upon the demised premises, whether those of the tenant or of a stranger, arises the moment the relation of landlord and tenant is established. It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained under a landlord's warrant. . . .
>
> While there is no specific lien, except on the goods actually distrained under the landlord's warrant, all the goods on the demised premises are to be considered as being under a quasi pledge, which gives superiority to the specific lien established by the distraint. Such a lien is in no sense "obtained through legal proceedings."

45. Comment, *The Pennsylvania Landlord and Tenant Act of 1951*, 13 U. PITT. L. REV. 396, 397 (1952).

46. Helser v. Pott, 3 Pa. 179, 186 (1846).

47. *See* Comment, *The Pennsylvania Landlord and Tenant Act of 1951*, 13 U. PITT. L. REV. 396, 397 (1952).

48. Santiago v. McElroy, 319 F. Supp. 284, 287 (E.D. Pa. 1970).

49. *See* Comment, *The Pennsylvania Landlord and Tenant Act of 1951*, 13 U. PITT. L. REV. 396 (1952), which thoroughly outlined the distraint procedure provided in PA. STAT. ANN. tit. 68, §§ 250.403-.404 (1965).

50. PA. STAT. ANN. tit. 68, §§ 250.401-.402 (1965), provide for certain exemptions from distraint for the tenant's personal property. Exemptions pertaining to personalty located on the tenant's premises, which title is in a third person, are provided in PA. STAT. ANN. tit. 68, §§ 250.403, 250.404 (1965).

51. The landlord or his agent could also distrain personalty located on the distrainee's premises for arrears in rent due on a terminated lease, if the property so distrained belonged to the tenant and "distress is made during the continuance of the landlord's title or interest in the property." PA. STAT. ANN. tit. 68, § 250.302 (1965). At common law, however, a distress for rent could not be made after the termination of the landlord-tenant relationship. Gandy v. Dickson, 3 Dist. 411 (1894), *aff'd*, 166 Pa. 422, 31 A. 127 (1895).

52. Baker v. Spector, 90 Pa. Super. 163, 165 (1927).

53. Bisk Candy Co. v. Stout, 289 Pa. 369, 137 A. 612 (1927). ". . . [A]cceptance of rent when overdue does not constitute a waiver of the right to demand prompt payment of later installments." *Id.* at 378, 137 A. at 615.

the property was specifically exempted by the Act of 1951,[54] all goods found on the tenant's premises were subject to distraint.[55] Within five days after making the distraint the landlord was required to give his tenant, or owner of the distrained personal property, notice personally, by mail, or by conspicuously posting on the premises charged with the rent. Such written notice specified the reason for the distress, the date of the levy, and the goods distrained, so as to sufficiently inform the tenant as to exactly what was distrained and what amount of rent was in arrears.[56] Prior to the *Fuentes* decision, if either the tenant or owner of the distrained goods acted within five days after the aforementioned notice, he could regain possession of his property by posting a bond for double the value of the goods distrained and by instituting an action in replevin.[57] But as the *Gross* court noted, posting of this replevin bond and regaining possession of the distrained chattels was a corrective measure which the tenant could no longer employ.[58]

III. *Fuentes v. Shevin*

In *Fuentes v. Shevin*,[59] both the Florida and Pennsylvania replevin statutes failed to withstand a constitutional challenge by purchasers of

54. PA. STAT. ANN. tit. 68, §§ 250.401-.404 (1965).

55. Goods belonging to third parties were included. Firestone Tire & Rubber Co. v. Dutton, 205 Pa. Super. 4, 6-7, 205 A.2d 656, 657 (1964); Frazee v. Morris, 155 Pa. Super. 320, 321, 38 A.2d 526 (1944); Reinhart v. Gerhardt, 152 Pa. Super. 229, 231, 31 A.2d 737, 738 (1943); Derbyshire Bros. v. McManamy, 101 Pa. Super. 514, 519-20 (1931).

56. PA. STAT. ANN. tit. 68, § 250.302 (1965).

57. *Id.* § 250.306 provided:

> The tenant or owner of any personal property distrained on may, within five days next after notice of such distress, replevy the same. All proceedings in replevin shall be conducted in accordance with general law and applicable rules of procedure governing actions of replevin. Before any writ of replevin shall issue out of any court of this commonwealth, the person applying for said writ shall execute and file with the prothonotary of the said court a bond to the commonwealth of Pennsylvania, for the use of the parties interested, with security in double the value of the goods sought to be replevied, conditioned that if the plaintiff or plaintiffs fail to maintain their title to such goods or chattels, he or they shall pay to the party thereunto entitled the value of said goods and chattels, and all legal costs, fees and damages which the defendant or other persons, to whom such goods or chattels so replevied belong, may sustain by reason of the issuance of such writ of replevin.

PA. R. CIV. P. 1073 provided:

> (a) An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with
>
> (1) the plaintiff's affidavit of the value of the property to be replevied, and
>
> (2) the plaintiff's bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the plaintiff fails to maintain his right of possession of the property, he shall pay to the party entitled thereto the value of the property and all legal costs, fees, and damages sustained by reason of the issuance of the writ.

58. 349 F. Supp. at 1167 n.4.

59. 407 U.S. 67, 96 (1972). PA. R. CIV. P. 1073 permitted a private party to commence

household goods under conditional sales contracts. The Supreme Court of the United States recognized that the prejudgment replevin procedure was originally used by tenants whose possessions had been wrongfully taken or "distrained." Recently the action's more frequent use was by creditors to seize goods wrongfully detained by debtors, not wrongfully taken. Unlike the common law, the Florida and Pennsylvania replevin statutes involved in *Fuentes* allowed prejudgment seizure without prior notice and an opportunity to be heard.[60] Thus, the *Fuentes* decision is regrettable for the procedure could have been justifiably continued within the context of landlord-tenant relations to the advantage of a tenant whose personalty had been distrained and certainly not to the disadvantage of a landlord who had notice of the replevin possibility, and who was not adverse to the idea of a tenant posting double the amount of rent in default.

After *Fuentes*, there remained the following remedies for the tenant upon whose property the landlord executed a levy:

(1) he could initiate an action of replevin without bond[61] and

---

an action of replevin with bond by filing a praecipe for writ of replevin with bond, *id.* 1073(a); plus an affidavit of value, *id.* 1073(a)(1), and a replevin bond double the value of the property, *id.* 1073(a)(2). The landlord followed this procedure on the condition that if he failed to prevail on the merits of his claim to possession of the replevied property, he would pay the rightful owner the value of the property and all legal costs, fees, and damages sustained by the tenant by reason of the issuance of the writ of replevin with bond, *id.* 1073(a)(2). The plaintiff could order the property impounded by the sheriff, *id.* 1077(b), or permit it to remain in the defendant's possession, *id.* 1077(a). In either case, the defendant was required to file a counterbond within three days, *id.* 1076(a), in the same amount as the original bond if he wished to immediately regain possession of the replevied property, *id.* 1076(b).

Prior to the original replevin, there was no notice given nor opportunity for a hearing afforded the defendant. A private party could obtain such a prejudgment writ of replevin merely through a summary process by ex parte application to the local prothonotary. *See* Fuentes v. Shevin, 407 U.S. 67, 76-78 (1972). There may never have been an opportunity for a hearing on the merits of the defendant's claim to possession of the replevied property, for the party who sought the writ need not have initiated a court action for repossession nor even formally alleged his lawful right to the property. *Id.* at 77-78. It was the defendant's responsibility to initiate the lawsuit himself in the case of replevin with bond. PA. R. CIV. P. 1037(a). In reference to the plaintiff's responsibility, the *Fuentes* Court stated:

> Unlike the Florida statute, however, the Pennsylvania law does not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property. The party seeking the writ is not obliged to initiate a court action for repossession. Indeed, he need not even formally allege that he is lawfully entitled to the property. The most that is required is that he file an "affidavit of the value of the property to be replevied." Pa. Rule Civ. Proc. 1073(a). If the party who loses property through replevin seizure is to get even a post-seizure hearing, he must initiate a lawsuit himself. He may also, as under Florida law, post his own counterbond within three days after the seizure to regain possession. Pa. Rule Civ. Proc. 1076.

407 U.S. at 77-78.

60. 407 U.S. at 77.

61. PA. R. CIV. P. 1073(b).

if he prevailed on the merits, he could then regain possession of his property;

(2) he could seek recovery for single damages if the distress was improper[62] or the distress and sale was made when no rent was due.[63]

The *Gross* court specifically found these trespass actions after the distraint to be wholly inadequate as substitutes for the constitutional requirements of prior notice and an opportunity to be heard respecting the rights affected.[64]

Pennsylvania's distraint procedure permitted the landlord, acting on his own unilateral claim of rent "reserved and due," to levy on personalty found on the tenant's property. Traditionally, to render the distraint complete, the slightest act was sufficient to constitute a seizure.[65] Hence, for a valid distraint there had to be "an assumption of control over the goods,"[66] which could have been effectuated by seizure of the property, entry upon the premises and a view of the chattels, or some other act such as threatened arrest for removal of the distrained property or physically preventing the removal of the property.[67] After the distress had been made the landlord had a right to impound the goods upon the premises and so deprive the tenant of their use[68] for a

62. PA. STAT. ANN. tit. 68, § 250.312 (1965).

63. PA. STAT. ANN. tit. 68, § 250.313 (1965). The policy was fully stated early in McElroy v. Dice, 17 Pa. 163, 168 (1851), partially quoted in *Gross*, 349 F. Supp. at 1167:

> It may seem a severe administration of justice to compel a landlord to pay damages for distraining for more rent than is due, without proof of express malice; but it must be remembered that the landlord is permitted to retain this remnant of feudal authority, and thus he is made the judge in his own cause upon the terms of conducting himself with perfect uprightness, and with a careful regard for the rights of the tenant. It has been repeatedly decided in Pennsylvania that a landlord has no right to distrain for rent *before it is payable*, by the terms of the lease, *even if the tenant is about to remove his goods*. So far as regards the rule of law, thus well known and established, the landlord must be deemed cognisant of the tenant's rights; and, in respect to the rent payable in money, it is equally just to presume that he knew what sums he had received, and what amount remained unpaid. Under these circumstances a disregard of the rights of the tenant by distraining for more rent than was due, renders the landlord liable to an action, without any other or further evidence of either malice or want of probable cause.

64. 349 F. Supp. at 1167, *quoting* from *Fuentes*, 407 U.S. at 81:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it [sic] was unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.

65. Furbush v. Chappell, 105 Pa. 187, 190 (1884); Derbyshire Bros. v. McManamy, 101 Pa. Super. 514, 523 (1931); Potts Dep't Store v. Lutz, 98 Pa. Super. 545, 549 (1930).

66. Mountcastle v. Schmann, 205 Pa. Super. 21, 25, 205 A.2d 642, 644 (1964).

67. *Id.* at 24-25, 205 A.2d at 644.

68. McElroy v. Dice, 17 Pa. 163, 168 (1852).

reasonable period of time thereafter,[69] which ordinarily was until the time of sale in due course.[70] Therefore, the distrained goods may or may not have been available for use on the premises depending upon the method by which the landlord sought to effectuate the "seizure."[71] Also, if the tenant removed the distrained property from the premises, section 311 provided that the landlord could recover treble damages plus costs from the erring tenant.[72] Hence, due to such restrictions on the use of the tenant's goods the *Gross* court was able to focus on the property interests of which the landlord had summarily deprived the tenant by the ex parte procedure. By the words of the *Gross* court, the tenant had been deprived of "any opportunity to dispose of his goods as he sees fit."[73] The length of time or severity of the deprivation is not decisive of the basic constitutional right to a prior hearing.[74] It is a tenant's interest in the continued possession and use of his goods which is protected as "any significant property interest" by the due process clause.[75]

For over a century, the Supreme Court of the United States has accepted as fundamental to procedural due process that a person be afforded notice and an opportunity to be heard before he may be deprived of his life, liberty or property.[76] For this right to notice and

---

69. Seyfert v. Bean, 83 Pa. 450, 453 (1877).

70. Holland v. Townsend, 136 Pa. 392, 403, 20 A. 794, 795 (1886).

71. 349 F. Supp. at 1166.

72. PA. STAT. ANN. tit. 68, § 250.311 (1965).

73. 349 F. Supp. at 1166. Basis for this statement was found by the *Gross* court in Buchanan v. Warley, 245 U.S. 60, 74 (1917), which was quoted as follows:

> Property is more than the mere thing which a person owns. It is elementary that it included the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. * * * (Citations omitted) Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.

349 F. Supp. at 1166.

74. Fuentes v. Shevin, 407 U.S. 67, 86 (1972). The Court observed:

> But it is now well settled that a temporary, non-final deprivation of property is nonetheless a "deprivation" in the terms of the Fourteenth Amendment. Sniadach v. Family Finance Corp., 395 U.S. 337; Bell v. Burson, 402 U.S. 535. *Sniadach* and *Bell* involved takings of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes included recovery provisions, allowing the defendants to post security to quickly regain the property taken from them. Yet the Court firmly held that these were deprivations of property that had to be preceded by a fair hearing.

Id. at 84-85.

75. 349 F. Supp. at 1166 n.3. *See* Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

76. Baldwin v. Hale, 68 U.S. (1 Wall.) 531 (1863). In *Baldwin*, the Court held ineffective against an out-of-state creditor a discharge under a state insolvency law, and stated, "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence." *Id.* at 534. And, in Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944), the Court stated, "The fundamental requirement of due process is an opportunity to be heard upon

hearing to have any practical effect it must be provided "at a meaningful time" to avert a wrongful deprivation.[77] A requirement of notice to the tenant within five days after the distraint, as provided by Pennsylvania's distraint procedure, would surely not have the remedial effectiveness that a prior hearing could provide. Following the *Fuentes* reasoning, the *Gross* court found such a constitutional infirmity could only be cured by providing adequate safeguards at a meaningful time and in a meaningful manner which could obviate the danger of an unfair or mistaken deprivation of the tenant's property.[78]

Dispelling any future argument that the seized goods are not deserving of due process protection unless they are absolute necessities of life, the *Fuentes* Court declared that the fourteenth amendment speaks of " 'property' generally."[79] Noting the exemptions from distraint pro-

---

such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Id.* at 246.

77. Mr. Justice Stewart, who authored the *Fuentes* opinion, fully stated the proposition upon which the Court based its determination of the necessity for notice and hearing granted at a meaningful time, that is, when the deprivation could still be prevented:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552.
>
> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . (And no) better instrument has been devised for arriving at truth than to give a person in jeopardy of serious less notice of the case against him and opportunity to meet it."

407 U.S. at 80-81 (citations omitted).

These views were recognized by the *Gross* court when it stated "modern notions of due process leave no room for landlords to be judges in their own causes." 349 F. Supp. at 1167. In quoting from *Fuentes*, the *Gross* court was able to hold that the trespass actions available to a tenant for improper distraint are not adequate substitutes, constitutionally, for prior notice and hearing. Such due process requirements must be granted before the tenant has had his property summarily seized. *Id.*

78. 349 F. Supp. at 1167. Mr. Justice Harlan wrote in his concurring opinion in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969):

> . . . I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use.

395 U.S. at 343.

79. 407 U.S. at 88-90.

vided in the Act of 1951, such an argument might have arisen in *Gross* were it not for the above declaration of the *Fuentes* Court. The Supreme Court of the United States found that if procedural due process was to be "applied with objectivity" the courts should not determine the constitutionality of a procedure upon their own distinctions and evaluations of what is to be deemed "necessary" for living.[80] Again, though the due process right to prior notice and an opportunity to be heard cannot be determined by the severity of the deprivation, the *Fuentes* Court held "the relative weight of liberty or property interest" relevant to the determination of the appropriate form of notice and hearing required by the due process clause.[81]

IV. Pennsylvania's Prejudgment Seizure: A Denial of Due Process

In *Gross*, as in *Fuentes*[82] and *Sniadach v. Family Finance Corp.*,[83] the court found the distraint procedure not to be such an "extraordinary situation" requiring special protection of the landlord which would justify the summary prejudgment seizure of the tenant's property.[84] In *Gross*, it was a private individual—a landlord—whose profit margin was at stake. Clearly the landlord-tenant relationship was "not one of those truly unusual situations where outright seizure without

80. *Id.* Understandably, one who reads *Sniadach* can find a rather direct "hint" that the interest being protected in that case was that which was necessary for life's existence. The *Sniadach* Court stated, "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. However, the *Fuentes* Court ended a virtual torrent of conflicting lower court opinions, by stating, "It is, after all, such consumer goods that people work and earn a livelihood in order to acquire." 407 U.S. at 89.

In light of Bell v. Burson, 402 U.S. 535, 539 (1971), which viewed the continued possession of a driver's license "essential in the pursuit of a livelihood" by the petitioner, it seems the narrow reading of *Sniadach* and Goldberg v. Kelly, 397 U.S. 254 (1970), was not unjustifiable. In clarification, the *Fuentes* Court stated that the *Sniadach* and *Goldberg* cases did not mark a radical departure from established principles of procedural due process. Those two cases were in the "mainstream" of Supreme Court cases in the past, which had "little or nothing to do with the absolute 'necessities' of life" but rather established that "due process requires an opportunity for a hearing before a deprivation of property takes effect." 407 U.S. at 88. The mainstream of procedural due process decisions has not been limited to the protection of but a few specialized property interests. "While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine." *Id.* at 89.

81. 407 U.S. at 86, 90 n.2.

82. *Id.* at 90.

83. 395 U.S. 337 (1969).

84. 349 F. Supp. at 1167-68. Such a "truly unusual" situation was limited by the *Fuentes* Court to be one in which: (1) seizure is directly necessary to secure an important governmental or general public interest; (2) there is a special need for prompt action; and (3) the government has strictly controlled the exercise of such force.

opportunity for a prior hearing is constitutionally justifiable."[85] Hence, the Pennsylvania distraint procedure, like the replevin with bond procedure which was struck down by the *Fuentes* Court, failed to withstand constitutional challenge. The prejudgment summary seizure authorized in the Act of 1951 served no extraordinary governmental purpose; the distraint procedure was without statutory limitations making it applicable to those "special situations" requiring prompt action to prevent destruction or concealment before seizure; and the state had given up effective control over the landlord's actions.[86] Upon the landlord's own determination of rent reserved and due and upon his own initiative, the landlord, or more usually a sheriff or constable acting under his direction, was allowed to take possession or control of the tenant's property. The state was merely the agent of a landlord and acted "largely in the dark."[87]

A full two years prior to filing the *Gross* opinion, Chief District Judge Lord also authored the opinion in *Santiago v. McElroy*,[88] which held violative of the fundamental principles of due process those distress sales made pursuant to the Act of 1951[89] which did not follow "a hearing of some sort" prior to the deprivation of a tenant's property.[90] Though finding its case indistinguishable from *Sniadach*, the *Santiago* court refused to declare invalid the full distraint procedure.[91] Such judicial restraint can be traced to a footnote in the opinion which clarified Mrs. Santiago's claim to be purely an objection to the sale.[92] The *Santiago* court found no evidence of entry into the apartment.[93] However, even in the interim between *Sniadach* and *Fuentes*, it would have been sufficient for the court to have found a temporary restriction

85. *Id.* at 1167. The *Gross* court then quoted from *Fuentes*, ". . . [S]tate intervention in a private dispute hardly compares to the state action furthering a war effort or protecting the public health." *Id. quoting* 407 U.S. at 93. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

86. Fuentes v. Shevin, 407 U.S. 67, 91-93 (1972). The Court observed:

> Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not "narrowly drawn to meet any such unusual condition." *Sniadach v. Family Finance Corp., supra*, at 339. And no such unusual situation is presented by the facts of these cases.

Id. at 93.

87. *Id.*

88. 319 F. Supp. 284 (E.D. Pa. 1970).

89. PA. STAT. ANN. tit. 68, § 250.309 (1965).

90. 319 F. Supp. at 294.

91. *Id.* at 293-94.

92. *Id.* at 292 n.13.

93. *Id.*

on the free use of the tenant's distrained property. Justice Harlan made it evident in his concurring opinion in *Sniadach* that it was the *use* of the petitioner's wages which was the property deprived without the due process of the law.[94] It was upon this basis, with the aid of the clear language of the intervening *Fuentes* decision as precedent,[95] that the *Gross* court found the levy and steps taken prior to the distress sale to be unconstitutionally restrictive of a tenant's free use of his property.[96] The *Gross* court most assuredly received greater justification to take the full step beyond the narrow holding of *Santiago* as a result of (1) the clarification of the property interest involved in due process rights by the *Fuentes* Court,[97] and (2) the rejection of the personal liberties/proprietary rights distinction for achieving a federal forum through 28 U.S.C. § 1343(3) (1970), by the Court in *Lynch v. Household Finance Corp.*[98]

---

94. 395 U.S. at 342 (Harlan, J., concurring). One student wrote: "The principal contribution of *Sniadach*, then, seems to lie in its recognition that a temporary deprivation of the use of property may be prohibited by the due process clause even when the deprivation will be brief and the debtor will eventually receive a hearing on the merits." Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Sniadach Case and Its Implication for Related Areas of the Law*, 68 MICH. L. REV. 986, 998 (1970).

95. "The appellants were deprived of such an interest in the replevied goods—the interest in continued possession and use of the goods. *See* Sniadach v. Family Finance Corp., 395 U.S. at 342 (Harlan, J., concurring)." 407. U.S. at 86.

96. 349 F. Supp. at 1166. A determination by the *Santiago* court that there was a deprivation of the tenant's use of the distrained property would not have been a precedentially unfounded conclusion. As early as 1851, the Pennsylvania Supreme Court had recognized that distress placed a heavy burden on the tenant. The court in McElroy v. Dice, 17 Pa. 163 (1851), observed:

> After a distress is made for rent in arrear, the landlord has a right to impound the goods upon the premises; the tenant is deprived of the use of them; is liable to treble damages if he rescue them without writ, and he cannot have a writ of replevin, however unjustly his goods may have been distrained, without giving security in double their value to prosecute his suit with effect, and to return the goods, if return should be awarded. This security it may be totally out of his power to give; and thus, although a *sale* may not take place, the tenant is deprived of the goods necessary to the comfort of himself and his family, or, it may be, of the merchandise, or implements of husbandry, necessary to the successful pursuit of his business. Thus incommoded, his business broken up and his credit impaired [the tenant was permitted to recover for the wrongful distraint].

Id. at 168.

97. 407 U.S. at 84-90.

98. 405 U.S. 538 (1972). In *Lynch*, the Household Finance Corp. sued Mrs. Lynch in state court alleging nonpayment of a promissory note. Prior to serving her with process, the finance company garnished her savings account under a Connecticut law which authorized such summary prejudgment garnishment. The defendant then brought a class action in federal district court challenging the validity of the state statutes under the equal protection and due process clauses of the fourteenth amendment, and sought declaratory and injunctive relief under 42 U.S.C. § 1983 (1970), and its jurisdictional counterpart, 28 U.S.C. § 1343(3) (1970). The district court dismissed her complaint on the ground, *inter alia*, that it lacked jurisdiction under section 1343(3) since it found that the section only applied if "personal" rights, as opposed to "property" rights, were impaired. Looking to the section's legislative history, examining 28 U.S.C. § 1331 (1970), for possible conflict, and recognizing that rights in property are basic civil rights, the United States

Thus, the *Fuentes* interpretation of *Sniadach*, the *Santiago* court's first step, and the tenant's inability to utilize his prior remedy of replevin with bond, foreshadowed a successful constitutional challenge to Pennsylvania's distraint procedure. The tenant's ability to parry his landlord's section 302 thrust had disappeared, but so had the landlord's opportunity for distinguishing *Sniadach* from the landlord-tenant relationship. Since replevin was so integral a part of the overall scheme of landlord-tenant relations, the *Gross* court was unable to follow the "hardline" of many decisions subsequent to *Sniadach* and prior to *Fuentes*.[99]

In light of the *Fuentes* assurance to those who must defend themselves in court that the due process clause is intended to safeguard their rights, the *Gross* court's holding was inevitable and hence rather unglorious. The fundamental right to prior notice and opportunity to be heard is a guarantee of the decision-making process which ensures the defendant protection against an arbitrary deprivation of his property. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."[100]

V. The Need for Revision of Pennsylvania's Distraint Procedure: A Compromise Landlord-Tenant Act

While the *Gross* court's duty was relatively easily accomplished, there remains for Pennsylvania's legislature the even more unappreciated task of rewriting both its distraint and replevin with bond provisions. Presently, the landlord is left without his "handiest remedy"[101]

Supreme Court reversed the lower court. In rejecting the district court's determination that the section was inapplicable to property rights, the Supreme Court held that for the purpose of achieving a federal forum through section 1343(3), there is no real distinction between personal liberties and property (proprietary) rights. For a further and detailed analysis of *Lynch*, *see* 11 Duq. L. Rev. 686 (1973).

99. See cases listed at 407 U.S. at 72-73 n.5. *See* note 80 *supra*.

100. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

101. 1 Pollock & Maitland, *supra* note 17, at 353. District Justice of the Peace Jon Barkman, 16-30-3, Somerset County, Pennsylvania, stated to this writer that he has utilized a "handy" substitute for the landlord's distraint remedy, the tenant's right to replevy and the landlord's eventual recovery of the rent in arrears. The landlord is instructed to padlock his tenant's premises and post a sufficiently muscular individual to ensure that no entry will be made by the tenant (or others). The tenant will then commence an action in conversion against his landlord. Normally, the hearing date for this trepass action would be between 12 and 60 days from the date the complaint is filed. Pa. R. Civ. P. J.P. 305. Though the complaint must be served at least ten days before the hearing, *id.* 307, the complaint should be served the same day the complaint is filed with the justice of the

which had provided him with a practical tool for dealing with his tenants' nonpayment of rent. The landlord's interest in recovering rent from his tenant who is in default can still be vindicated through assumpsit,[102] but it is evident that the time factor can make such a remedy rather hollow. Clearly a useful judicial procedure is needed which will both deter tenants from attempting to live for a few months without paying rent and prevent landlords from making unwarranted threats of levy on his tenant's property.[103] Success on either level is possible. Fulfilling the two policies in the same statute, however, will be a difficult endeavor.

At the present time, the Pennsylvania legislature is attempting to find harmony between these two positions. Hence, an opportunity becomes available to make a few unsolicited suggestions. It is submitted that a compromise can be struck by employing the services of the minor judiciary. The "nearest available magistrate"[104] is the logical authority for providing the landlord and his tenant with a distress hearing. One of the most persuasive arguments in favor of Pennsylvania's prior distraint procedure was its susceptibility to facilitate a landlord's just recovery without entering the judicial arena and suffering from its crowded docket and increased expenses. The justice of the peace system was intended, *inter alia,* to settle neighborhood disputes which have reached a stage beyond face-to-face negotiation. Landlord-tenant problems, whether they concern rent, repairs or fellow tenants, are all

peace. In response, the landlord should counterclaim for the amount of rent in arrears. This counterclaim has a threefold effect: (1) the period within which the hearing must be scheduled is reduced to between 12 and 30 days, *id.* 315B; (2) the landlord's claim for overdue rent is introduced into the tenant's action rather than having a separate landlord action for the overdue rent in assumpsit; and (3) the opposing parties probably will be forced to look one another eye-to-eye, if not that very day, at least after twelve days.

District Justice of the Peace Barkman felt that at least three factors combine to bring a quick resolution of the problem: (1) the magistrate's skillful handling of the parties; (2) the fact that both parties seek remedies founded upon a situation brought about by one's inaction and the other's action; and (3) the tenant's inability to enter his apartment or business. The settlement need not be in a lump sum. The parties should be encouraged to agree upon increased rental payments to cover the settlement figure. In many cases, District Justice of the Peace Barkman commented, it is an assurance by the tenant that he will pay his rent in arrears that is sought. Also, avoidance of encumbering a tenant with back payments in one lump sum will aid the tenant whose nonpayment of past rent was due to good faith reasons.

102. PA. STAT. ANN. tit. 68, § 250.301 (1965).

103. Note, *Landlord and Tenant—Pennsylvania Distress and Distraint Law,* 18 VILL. L. REV. 771, 784 n.108 (1973). That student reminded the reader that without distress, the landlord is in the position of a general creditor. Under PA. STAT. ANN. tit. 68, §§ 321, 322 (1965), the landlord's lien for rent in arrears had priority over bank liens in the distribution of assets of his insolvent tenant. *In re* Einhorn Bros., Inc., 272 F.2d 434, 438 (3d Cir. 1959); *see* Note, *Landlord and Tenant—Pennsylvania's Distress and Distraint Law,* 18 VILL. L. REV. 771, 784 n.109 (1973).

104. PA. STAT. ANN. tit. 75, § 1201(d) (1971).

basically neighborhood problems which could find fast and fair resolution before a magistrate who is familiar with such problems in his "neighborhood."

The absence of overly-formalized procedures in the minor judiciary would readily enable the tenant to present his side of the issue.[105] The very nature of a procedure which will permit the tenant to settle his or his landlord's dispute quickly, ensures the prevention of the usual malady of landlord and tenant squabbles—pointlessness.[106] A procedure which forces the parties to confront one another before a local magistrate has the tendency of ensuring a relatively quick settlement. Parties who face one another after reasonable notice will stand on stronger ground, both emotionally and in terms of preparation, than they would when suddenly faced with a sheriff and a writ.

Preservation of a section ensuring recovery of rent through assumpsit[107] will provide for those circumstances in which the amount of the rent past due exceeds the jurisdictional authority of the minor judiciary,[108] when the nonpaying tenant is a businessman and not an apartment dweller, or any other situation in which the importance of time and costs is outweighed by other factors. The separation of commercial tenants from residential tenants in the formulation of a new landlord-tenant act would provide a direction for the satisfaction of the tenant's due process rights. Since the liberty and property interests involved in an apartment lease may be considered to have greater relative weight than those of leased business space, the legislature may properly prescribe varied forms of notice and distress hearings.[109]

Rent should continue to be legally in arrears on the next day after the due date. Permitting notice of a distress hearing only upon the expiration of a certain period in which rent remains unpaid would amount to a wholly unreasonable incursion into the landlord's contractual domain. Hence, it is urged that a statute providing for notice of a

105. Lindsey v. Normet, 405 U.S. 56 (1972). "Tenants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they received a proper notice to quit, if one is necessary." *Id.* at 65.

106. Small landlords who pay bills from collected rent can neither afford the additional expense of litigation nor the loss of continued capital during a dispute with a nonpaying tenant. And, the tenant who unceremoniously leaves town with family and possessions or the tenant whose financial condition is deficient only gives a landlord, who seeks a judgment against that tenant, a sense of futility.

107. PA. STAT. ANN. tit. 68, § 250.301 (1965).

108. PA. STAT. ANN. tit. 42, § 241 (Supp. 1973), provides the minor judiciary with concurrent jurisdiction with the courts of common pleas in contract or trespass actions which do not exceed $1000 and where the title to lands or tenements are not in question.

109. 407 U.S. at 90 n.21.

distress hearing should allow immediate service upon arrearage and should provide seven days notice of the hearing.[110] As provided by the Pennsylvania rules of civil procedure for justices of the peace, judgment will be given at the conclusion of the hearing or within five days thereafter,[111] and an appeal must be taken within twenty days after the judgment.[112] The shortened period from the date of notice to the date of hearing will keep the period of the initial distraint proceedings to about a month. This period closely coincides with the normal monthly obligation of the tenant to pay his rent and serves a dual purpose:

> (1) it strengthens the constitutionality of the short notice period since the tenant is always on notice that his rent is due at the end of the month, and the factors to be pleaded are not only within the tenant's grasp, but are fresh and susceptible of facile organization and presentation;[113]
>
> (2) the landlord whose expenses continue to accrue whether his tenant pays his rent or not, will benefit from such speedy adjudication by avoiding prolonged and possibly undeserved economic loss,[114] and by being assured that his tenant remains within the grasp of judicial process.

For those who anticipate the unwarranted use of the distraint procedure arising from the retained case law that rent is "reserved and due" when merely a day late, it must be remembered that landlord-tenant relations are not naturally antagonistic.[115] Clearly, unrestrained use of a powerful weapon may bring hostility between the parties, but it also

110. PA. R. CIV. P. J.P. 305(1) provides that the justice of peace shall set a hearing date not less than twelve days nor more than sixty days from the date a complaint is filed. However, Lindsey v. Normet, 405 U.S. 56 (1972), held two to six days to be sufficient time for the tenant to prepare for the single issue of the landlord's right to regain possession under the Oregon forcible entry and wrongful detainer statute. The *Lindsey* Court concluded that the short notice before trial was necessary in order to prevent the landlord from being subjected to undesired economic loss and to protect the tenant from incessant and perhaps violent harrassment. *Id.* at 73.

Query whether the Pennsylvania legislature should also seek to limit the triable issues at the distress hearing to the existence of the landlord-tenant relationship and the fact of actual rent in arrears. Under the reasoning of *Lindsey*, Pennsylvania has a legitimate interest in facilitating the settlement of landlord-tenant disputes promptly and peacefully, and those permissible state objectives can be achieved by statutory provisions for a speedy trial and strict limitation of triable issues without violation of the tenant's rights to due process and equal protection of the laws. *Id.* at 63-69.

111. PA. R. CIV. P. J.P. 322.

112. *Id.* 1002. The framers of rule 1002 noted:

The twenty day limitation in this rule is the same as that found in § 5(b) of the Minor Judiciary Court Appeals Act. Because of the prohibition in Article V, § 10(c), of the Constitution against suspending by rule any "statute of limitation or repose" (*see* Overmiller v. D. E. Horn & Co., 191 Pa. Super. 562, 159 A.2d 245, 1960), it appears that this time limitation must be retained.

113. Lindsey v. Normet, 405 U.S. 56 (1972).

114. *Id.* at 72-73.

115. It appears that "violence and quarrels and bloodshed" only arise upon the im-

brings adverse publicity in the tenants' market and tends to color the same magistrate's viewpoint of the landlord's believability.

Although proceedings on appeal from the minor judiciary to the court of common pleas are conducted de novo,[116] it is suggested that an appeal should only be taken in the same manner as allowed by law from final decrees and judgments. As a result of the legislature's action to improve the quality of the minor judiciary through requirements of greater legal exposure[117] and by reason of the rather simple issues involved in determining the right to distrain for rent in arrears, the legislature should find little impediment to declaring the magistrate's distress hearing appealable in the same manner as it would have been from the court of common pleas. No doubt questions of set-off, rent withholding, and repairs may necessitate special consideration by the legislature, the consequence of which should be to provide the hearing authority with specific guidelines.[118]

---

plementation of self-help remedies. *See* Lindsey v. Normet, 405 U.S. 56, 71 (1972). Thus there should be that additional incentive to the restrained use of the distraint procedure—fear for one's own self, as well as his leased premises.

116. PA. R. CIV. P. J.P. 1007.

117. PA. STAT. ANN. tit. 42, § 1214 (Supp. 1973).

118. Thorough formulation of a landlord-tenant security deposit law is absolutely necessary. Extension of the present law, PA. STAT. ANN. tit. 68, §§ 250.511a, b, c, .512 (Supp. 1973), should only be accomplished after the effect of these recently enacted statutes has been assessed. Under the above-mentioned law, the amount of a damage deposit required by the landlord is set at no more than two months' rent for the first year of the lease and no more than one month's rent for the second and subsequent years. For a lease running into three years or more, the landlord is required to give his tenant interest along with the return of the security deposit at the termination of the lease (or upon "surrender and acceptance of the leasehold premises"). *Id.* § 250.511a.

An important subsection, in light of the standard form waiver of the Landlord-Tenant Act of 1951, provides: "(f) Any attempted waiver of this section by a tenant by contract or otherwise shall be void and unenforceable." PA. STAT. ANN. tit. 68, §§ 205.511a, .512 (Supp. 1973). At this point, it should be noted that the legislature made these sections applicable only "to the rental of residential property." *Id.*

All funds over one hundred dollars deposited with the lessor as a security deposit are required to be deposited in an escrow account. *Id.* § 250.511b. However, the landlord may by "good and sufficient guarantee bond" secure the repayment of the security deposit funds, in lieu of depositing them in an escrow account. *Id.* § 250.511c.

Within thirty days of the termination of the lease, the landlord is required to provide the tenant with a written list of damages and the payment of the difference between the security deposit plus interest (if payable) and the amount of the actual damages. Failure to do so will result in the landlord's liability for double the amount which the security deposit plus interest exceeds the actual damages. *Id.* § 250.512.

Retention of the Pennsylvania Rent Withholding Act, PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1973), which provides that so long as the leased premises are in violation of health and/or safety codes and so long as the tenant remains in possession, the withheld rent will be deposited in an escrow account, is justified. The withheld rent will be paid to the landlord "when the dwelling is certified as fit for human habitation at any time within six months from the date on which the dwelling was certified as unfit for human habitation." *Id.* If at the end of the six-month period the premises remain certified unfit, the deposited rents will be refunded and the tenant does not have a right to continued possession of the unfit premises. *See* Klein v. Allegheny County Health Dep't, 216 Pa. Super. 50, 261 A.2d 619 (1969). Furthermore, the funds which were deposited in escrow may

As for the general feeling that a distraint procedure providing for prior notice and an opportunity to be heard will work an injustice on the landlord whose tenant packs up his belongings and moves before the hearing, it must be remembered that such happenings surely occured under the prior distraint procedure and that assumpsit remains as a remedy. Yet under those circumstances the legislature should be able to follow the hint of the *Fuentes* Court: "[t]here may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."[119] Hence, the legislature may provide for "special situations demanding prompt action"[120] by permitting prejudgment distraint upon the presentation of facts to the magistrate which tend to establish the inference drawn by the landlord.

To effectuate the above procedure to meet the circumstance of a tenant attempting to avoid the payment of his rent and the clutches of the distress process, and to generally assure the landlord of his remedy, the tenant should be required to supply his landlord with a list of the distrainable goods to be revised yearly. The landlord has a right to protect himself and such a requirement cannot be deemed an invasion of privacy when balanced against the state's legitimate interest in protecting the landlord who undertakes tremendous financial risks and provides an essential service to the community. On the other hand, the tenant should not be the subject of non-emergency entry without notice.

VI. Conclusion

Today's contractual relationships have become the beneficiaries of the public, judicial and legislative awareness of consumer due process. Landlord-tenant law must not remain in its feudal shadows. Rather, it should afford protection not only to those whose substantive right to collect rent seemingly necessitated the development of the distraint procedure, but also, it should secure the due process rights of those who by necessity are required to live in rental housing. Particularly for the urban poor, landlord-tenant problems serve as an introduction to the legal system. The poor tenant's problems of meager income, in-

be utilized to make the dwelling fit for human habitation and to pay the utility services which the landlord, though obligated, refuses or is unable to pay. PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1973). If the landlord makes the repairs, presumably he will receive the withheld rent less any funds expended by the tenant to make the premises more habitable. *See* 10 DUQ. L. REV. 113 (1971).

119. 407 U.S. at 93.

120. *Id.*

adequate or no employment and lack of educational opportunity will still remain though provision has been made for their rights within the requirements of the due process clause of the fourteenth amendment. As for the landlord, remembering that a continuing stream of rental income may be required to maintain the landlord's property, pay his real estate taxes, and service his debts and investments, too harsh a reform will discourage the small prudent investor from such ventures. Motivated by the growing public dissatisfaction with ancient doctrines which guide their twentieth century lives, the legislators should seek statewide input in the formulation of a compromise Landlord-Tenant Act of 1974.

DAVID S. POLLOCK